Business Central

Submission to the Education and Workforce Parliament Select Committee on the Employment Relations (Triangular Relationships) Amendment Bill

May 2018

1.0 INTRODUCTION

1.0 Business Central welcomes the opportunity to make a submission on the Bill. It wishes to appear before the select committee to present its submission.

1.1 Business Central is a business membership association, representing 3,400 members and their interests throughout central New Zealand from Taranaki across to Gisborne and down to Nelson. Business Central is one of the four regional organisations comprising New Zealand's peak business advocacy group, BusinessNZ. In Wellington, our organisation operates the Wellington Chamber of Commerce, accredited to the New Zealand Chamber of Commerce network. Our organisation also delivers ExportNZ to Wellington, the Hawke's Bay and the Central region.

1.2 Business Central is a recognised leader in employment advice, consultancy and training – regarded as the authority in the fields of employee relations, occupational health and safety, and people management. We provide practical advice and training solutions that reflect the needs and challenges faced by employers every day - our team is focused on common sense approaches to handling real-life situations.

1.3 Business Central has been the voice of employers and business in the Central region for over 100 years, advocating policies that reflect the interests of the business community. Business Central advocates the views of our members and obtains that view through regularly surveying members.

1.4 Business Central has been closely following policy developments during and following the 2017 election, given the now Coalition-Government campaigned on a range of employment law changes

1.5 Business Central wholly endorses both BusinessNZ's submission and comments.

Recommendations

1.6 Business Central opposes the Bill and recommends that it not proceed in any form.

2.0 OVERVIEW

2.0 The Bill permits an employee of one organisation who is deployed by their employer to work for, and under the direction of, another employer to be covered by a collective agreement that applies to the second employer. It also permits the employee to take personal grievances against the secondary employer by providing that the employee may join the secondary employer to any

personal grievance action they may take in relation to their employment with their primary employer.

2.1 Business Central understands that the Bill is, at least in part, driven by concerns that some workers have been exploited by virtue of poor treatment by the secondary employer. The case of Prasad v LSG Sky Chefs[1] has been frequently quoted in this regard.

2.2 Business Central does not condone exploitation of any kind. That said, existing law already provides minimum standards that arguably are sufficient to address such cases.

2.3 This raises the question of why the Bill is necessary, other than supporting a global union campaign against the use of labour hire.[2] The narrative of this campaign is that forms of work other than permanent full-time employment are "precarious", "vulnerable", undesirable, and therefore should be discouraged. This narrative does nothing to protect the employment of workers who are necessarily employed in short term engagements.

2.4 Furthermore, the union narrative is at odds with recent international agreements on *Non-standard Forms of Employment* [3] and *Fair Recruitment*.[4] These were negotiated by governments, unions and employers in tripartite fora at the International Labour Organisation during 2015 and 2016. They underscore the idea that all forms of employment have their place, provided they are used appropriately. The agreements do not subscribe to the idea that any one form of employment has precedence.

2.5 Despite its apparently benign intentions, the Bill arguably does less to protect labour hire workers from exploitation than it does to enhance the ability of unions to recruit new members from the ranks of labour hire workers. This too is consistent with the global union narrative outlined above. The relationship between these elements is illustrated in the diagram attached at Appendix 2.

What's wrong with the Bill?

2.6 The Bill and the underlying campaign seemingly ignore the fact that much work today is by definition short term in nature and cannot be economically fulfilled through permanent engagements. It also ignores the fact that marginalising short term work will cost short term workers their jobs and drive up the cost of long term work, which will also cost jobs.

2.7 Indeed, when added to the effects of the already announced significant increases to the minimum wage, the increased costs inherent in the Bill's provisions are almost certain to increase job losses far beyond the several thousand already predicted by government officials as a result of the minimum wage increases.

What are triangular relationships?

2.8 The term "Triangular relationships" describes situations where a worker is hired by one employer but works for another. Labour hire is the classic example of this relationship, but it is not the only example.

2.9 Clause 5 of the Bill would amend section 56 of the Employment Relations Act 2000 ("the Act") to read -

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[1] https://employmentcourt.govt.nz/assets/Documents/Decisions/2017-NZEmpC-150-Prasad-v-LSG-Sky-Chefs-Ltd.pdf

[2] See Appendix 1

[3] http://www.ilo.org/global/topics/non-standard-employment/whatsnew/WCMS_336934/lang--en/index.htm

[4] http://www.ilo.org/gb/GBSessions/GB329/ins/WCMS_545839/lang--en/index.htm

56 Application of collective agreement

(1) A collective agreement that is in force binds and is enforceable by—

(a) ….

(b) ….

(c) the employees of any primary employer in respect of the primary employer where –

(i) those employees are performing work for a secondary employer where that work is within the coverage clause of any collective agreement to which the secondary employer is a party; and

(ii) those employees are a member of the union party to that collective agreement; and

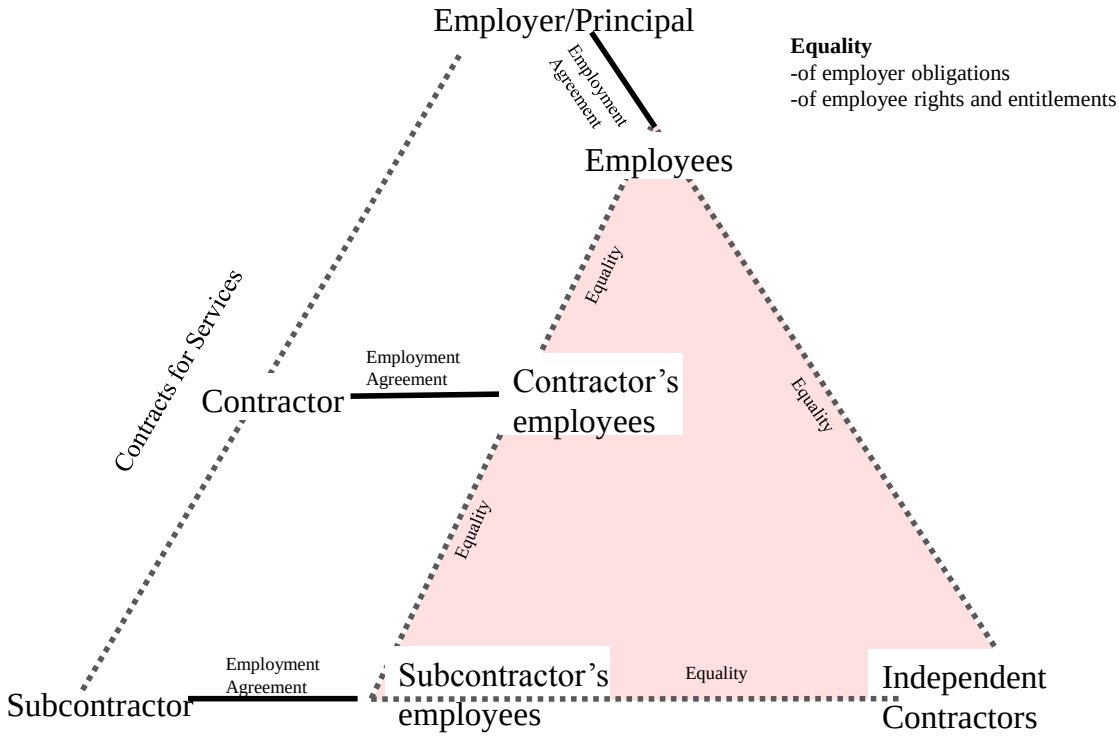
(iii) those employees are not bound by any other collective agreement to which the primary employer is a party

2.10 Employees employed by one employer, but working under the control and direction of another business or organisation, would have the right to coverage of a collective agreement covering the work being performed for the client organisation. In other words, labour hire workers effectively would become employees of the employment agency's clients for the duration of their engagement. The cost of that employment would be borne ultimately by the secondary employer.

2.11 This has massive consequences for the labour hire industry and any other business whose employees work for the benefit of their employer's client, and for the firms that use its services as, inter alia, it would force labour hire agencies to raise prices to levels that will ultimately incentivise clients to hire directly. From an economic viability viewpoint, it has similarly massive consequences for the clients of such organisations.

2.12 The relationships between contractors and their clients that would exist under the Bill is illustrated below.

Triangular Relationships



3.0 COMMENT

Collective coverage of labour hire and similar workers

3.0 The use of temporary labour sourced through labour hire or some other agency temping is a prevalent practice in such industries as construction, manufacturing, horticulture, viticulture, event management, entertainment, tourism, hospitality, restaurants and retail. It is also common in office environments and for hiring nurses in the health sector. These industries are all characterised by a need for at least a portion of their workforce to be short term, often also short notice, employees. Seasonal or event based needs, or the need for extra staff to cover a specific contract or project, or temporary absences from work, dictate the level of workforce needed at any given time.

3.1 The cost of "in-sourcing" such work is high and more than likely to be unsustainable in the longer term. Rather than having to set up and maintain the staff and systems necessary to manage the constant "traffic" of temporary staffing requirements, there are major benefits to productivity and long-term sustainability for companies with fluctuating labour needs to manage these centrally through labour hire or similar agencies.

3.2 Almost all construction, including vital upgrades to New Zealand's core infrastructure, is dependent on the timely availability of specific skilled and unskilled workers. In other words, keeping the cost of buildings, roads and other infrastructure down depends on having the required type and quantity of skilled employees available only for as long as they are needed. Today, such employees are provided mainly through labour hire agencies. Construction companies typically have a core of permanent workers (commonly on collective agreements), then hire needed extra labour through agencies for specific projects. Indeed some projects (e.g. roads) are managed entirely through contracted labour.

3.3 Another, poorly understood facet of the labour hire industry is its role in placing unemployed people. Alongside the Ministry of Social Development and dedicated recruitment agencies[5], labour hire agencies routinely find employment for persons who might otherwise struggle to be appointed. Agencies are able to both place such people because of their large client base and knowledge of the labour needs to those clients and to redeploy them if their fit to the first opportunity is not optimal. Among other things, this ability has been an important factor in the Department of Corrections being able to place released or paroled prisoners back into the community. It is equally important in relation to apprenticeship schemes that place apprentices with employers as part of their training.

Costs of employment can only increase

3.4 The cost of an, even temporarily, unproductive employee is high, which is a key reason casual, temporary or fixed term employment options exist. An employer who maintains a workforce at peak load levels must bear the cost of underutilised or otherwise non-productive employees when demand is down.

3.5 The costs of such employees need to be met somehow, usually by being passed on to customers, ratepayers or taxpayers. While this may have been possible in the past, particularly inside the protected domestic economy of the 70s and 80s, it is not a sustainable option for businesses operating in today's competitive and globalised world**.** Nor is it compatible with the Government's stated desire for New Zealand to be a high wage high performing economy.

3.6 The Bill is likely to force labour hire companies to put up prices significantly, marginalising the value of this service. This will eventually force businesses to manage their own labour hire with all the attendant inefficiencies that that entails.

[5] Recruitment agencies do not employ the people they place. They also typically deal in higher skilled jobs. Labour hire agencies routinely deal in all forms of labour.

3.7 All of these scenarios have only significant negative consequences for employers, workers and the economy as a whole. One project at risk of such consequences may be the Government's "affordable housing" initiative. Nurses too are often sourced through agencies to cover shortfalls. Paradoxically, agency nurses usually command higher wages than "normal ones". Being subjected to the conditions of the client's collective agreement may in fact make it less attractive for them to accept the work for which they are so desperately required.

It's not just labour hire workers

3.8 The Bill's apparent focus is on workers hired via agencies such as labour hire or "temp" agencies.

3.9 However there are many other situations in which workers may be engaged by one employer to work for another. A major example is maintenance work in major industrial and manufacturing facilities. It is usual for such facilities to shut down periodically for pre-planned maintenance, typically 2-3 times a year.

3.10 As the costs of down time and the associated maintenance often amount to millions of dollars on each occasion, it is usual for plant operators to engage external contract labour to augment the domestic maintenance workforce in order to keep unproductive downtime short. This can involve up to several hundred extra workers on each occasion. The "shut" work is almost always supervised by the plant operator to ensure that safe operating conditions exist during and post shutdown, and to ensure a smooth restart and reliable ongoing operation.

3.11 Most such workers have permanent employment with their employer. Their working life consists of moving from "shut" to "shut".

3.12 These workers are also caught by the Bill's provisions. A highly paid tradesperson working for an engineering firm who is deployed to a dairy factory during a shut will be an employee of a primary employer working for the benefit of a secondary employer just as much as will an office temp employed by a temp agency and hired out to a law firm to cover an absence.

3.13 The potential for costly disruption to the smooth operation of New Zealand's major manufacturing capacity is significant and runs directly counter to the Government's ideals of a high wage, high performing economy.

3.14 Similar risks are apparent in the horticulture and viticulture industries which both rely on seasonal labour, sourced often through recruitment agencies, to pick produce and prepare it for export or domestic sale. Workers affected here include those recruited under the Regional Seasonal Employment (RSE) Scheme that offers work to Pacific Islanders each year.

3.15 Still more risks are apparent with respect to Group Apprenticeship schemes, where apprentices are employed by a training organisation and deployed to clients who are invoiced for the apprentices wages.

Personal Grievances

3.16 Furthermore, once agency sourced temps are on board with a client, they will have access to grievance rights against the client, making the process of releasing those temps, even once they inevitably are no longer needed, challengeable through the courts.

3.17 Clause 6 of the Bill provides that

> **102A Joinder of parties to personal grievances**

(1) Where an employee employed by a primary employer raises a personal grievance against that employer the employee may, if the grievance has also been raised with nay secondary employer of the employee, apply to the Authority or court to join that secondary employer to the grievance.
(2) For the subsequent determination of a personal grievance the actions of any secondary employer are deemed to be the actions of the primary employer.
(3) Any secondary employer joined under this section is jointly liable with the primary employer for any remedies awarded t the employee unless the Authority or court makes an order determining the proportion of any award to be made to each party.
(4) The Authority or court must grant leave if-
(a) the actions of the secondary employer have resulted in or contributed to the grounds of a personal grievance as defined in section 103; and
(b) it considers it just to do so.

3.18 Under current conditions, a business that engages temporary employees via an agency (or labour hire company) can ask the agency to take the employee back and replace them with another if for any reason the "temp" is not working to required levels of competence of output.

3.19 This ability is of significant importance; as hiring short term labour comes with the added burden of bringing the "temp" up to speed with the safe and proper procedures, practiced by the client company. This places an onus on a labour hire agency to send workers who are already competent in the required skills, and adept at integrating quickly into different business operating environments.

3.20 Providing an ability for agency or labour hire workers to join a client business to a grievance over their recall from a client is likely to stifle if not extinguish the value of agency based temp workers in almost every business they are currently deployed. This is likely to have very significant ongoing implications. One may be that businesses will directly hire more casual and fixed term employees to cover short term needs, inevitably at a cost both to itself and its own customers and clients. Paradoxically, it will not lead to an increase in permanent full time work as desired by the global union movement, as the need to maintain flexibility around fluctuating labour needs will become even more important to businesses.

3.21 In addition to the issues outlined above, extending the right for a worker to take a grievance against a secondary employer carries extra risks when added to the proposed extension of anti-union discrimination provisions contained in the Employment Relations Amendment Bill, currently also before the Education and Workforce Select Committee. This adds to the existing rebuttable presumption that the employer discriminated against a union member because of involvement in activities of a union, by adding the criterion of union membership. This is a very significant development because a rebuttable presumption is a reverse onus of proof, i.e. the employer is guilty until the allegation can be rebutted.

3.22 Inclusion of union membership in the ambit of rebuttable presumptions has potentially significant implications for the performance management of employees. A union member who is redeployed by their primary employer at the request of a client has only to allege discrimination on the grounds of union membership and the process of redeployment becomes a litigation based on the allegation of discrimination. The employer must then defend the allegation before being able to proceed with any redeployment. In the meantime productivity, both of the employee or employees concerned and of employees in the wider workplace, may be unduly affected.

3.23 Introduction of a right to join client businesses to grievances will add potential risks and costs of litigation to any short term labour hire engagements. When considered in the context of events such as maintenance shutdowns of major manufacturing facilities the negative implications for improved productivity and economic growth are self-evident, let alone for any other form of temporary engagement.

3.24 Leaving aside the dubious ethics of assigning responsibility to someone with little ability to influence a secondary employer's decision making, if the Government is as concerned as it says it is about national productivity these proposals are inconsistent at best. For instance construction, which is an industry with already high marginal risk, will become an increasingly, and potentially excessively, risky and costly business.

Unions are the main beneficiaries

3.25 To access the protections offered by the Bill, labour hire workers will first need to work for a client that has a collective agreement that covers the work they are doing. Then they will need to join the union that is a party to that collective agreement.

3.26 Business Central understands that relatively few labour hire workers are unionised and/or covered by a collective agreement with their primary employer. Those few that that are, are already protected by their agreement with their primary employer. For the majority that do not already have coverage of a collective agreement, it is quite likely that the terms and conditions of the client's collective agreement will be better than those offered by the labour hire agency. In such cases, there is a significant advantage to a labour hire worker to join the union, even though the conditions applying to their employment with the labour hire agency usually are far from exploitative. An example is Group Apprenticeship schemes. An apprentice who joins the union that is party to the client's CEA will be covered by the client's CEA, including pay. These conditions are likely to be more advantageous than conditions applicable in the training agency that placed the apprentice with the client.

3.27 In such situations, and arguably these will be the majority of situations, the impact on the employer and the employer's customers will be increased costs. The only beneficiary in such cases is the union that recruits the labour hire workers. The benefits to the union may be short lived though, as secondary employers seeks to minimise costs and find other means of achieving their objectives.

3.28 The sheer frequency with which labour hire workers are deployed creates its own administrative issues which may also make any union benefit marginal. This is because different employers will be covered by different collective agreements not all negotiated by the same union. Will labour hire workers be expected to change unions as often as they change jobs? Will workers find certainty in not knowing what their conditions of employment will be from one assignment to the next?

3.29 Employers will face similar burdens in having to address issues of bringing new employees into the workplace. The Employment Relations Amendment Bill currently also before the select committee contains a number of cumbersome provisions that will also be applicable to bringing labour hire workers into the ambit of the secondary employers' collective agreements. These include advising employees of the existence of relevant union, advising the union of the existence of prospective members, and deducting and remitting union fees to the union once they join. These tasks will be all the more onerous due to the relative frequency with which temp and agency workers come and go.

Overseas experience

3.30 In 2002, the European parliament introduced an almost identical piece of legislation (the "agency workers directive"). However, this was stalled in the European parliament until 2008 as legislators tried to unravel the complexities raised by the same issues we have identified above. The EU now operates under the Temporary and Agency Workers Directive 2010.[6] However European based research conducted in 2016 suggests that the desired impacts of this Directive have not been realised, mainly because member countries see the need for some flexibility in their temporary labour supply.[7]

[6] The Directive can be found at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008L0104

[7] http://journals.sagepub.com/doi/pdf/10.1177/201395251600700106

4.0 CONCLUSION

The Bill creates far more problems than it solves. It will add costs that must be passed to customers who in many cases may not be able to pay. Affordable housing is a major example. The Bill also considerably enhances the ability of unions to recruit new members while not adding to the productive capacity of business. It will increase exposure to litigation from labour hire workers who have been asked to return to their primary employer. Nothing in the Bill provides any support for the idea of a highly productive and high wage economy.

4.0 Business Central recommends that the Bill not proceed.

APPENDIX 1

Excerpt from proceedings of Sixth Annual Meeting of the Global Unions

Nyon, Switzerland, 23-24 January 2012

Appendix – Amended Principles

Global Union Principles on Temporary Work Agencies

Policy positions differ in the trade union movement, both at national and international levels concerning the use of temporary work agencies. Views vary from total bans on such agencies, to partial bans, to strict regulation. There are also differences as to on what basis workers should be covered by collective bargaining agreements. However, there are certain views shared by all Global Unions.

The first principle is that the primary form of employment shall be permanent, open-ended and direct employment.

Fundamental principles on temporary work agencies

The primary form of employment shall be permanent, open-ended and direct employment.
Workers provided by temporary work agencies must be accorded equal treatment and opportunities, including equal pay for equal work, with regular and permanent employees with respect to terms and conditions of employment.

Workers employed through temporary work agencies must have a recognised and enforceable written contract of employment, specifying their terms and conditions of employment.

Where agencies are permitted to operate, they must be strictly regulated, including through licensing.

Temporary work agencies must not be used to eliminate permanent and direct employment relationships, diminish the conditions under which work is performed, avoid collective bargaining relationships with trade unions or effectively make it impossible for an agency worker to join a trade union.

Employers should consult trade unions before agency workers are used and negotiate over any effects that the use of these agency workers might have on regular employees, on working conditions or on the collective agreement.

The use of temporary agencies should be restricted to cases of legitimate need. As a minimum, there should be defined limits on the use of agency workers, as well as restrictions on the duration of such employment.

Workers provided by temporary work agencies must be guaranteed access to information on health and safety regulations in the workplace and be given the same equipment, induction and training as permanent workers.

Adequate and continuous social protection for agency workers, including social security coverage, must be ensured by employers and government alike.

Temporary work agencies must treat workers without discrimination on the basis of race, ethnic origin, colour, sex, sexual orientation, religion, political opinion, nationality, social origin, age, disability or any other form of discrimination. Appropriate regulatory frameworks (governmental, co-regulation or self-regulation) on private employment agencies should include and promote these principles, rights and obligations. These include the minimum standards outlined in ILO Convention No. 111.

Given the general over-representation of women in agency employment and the disparity in wages between permanent and agency workers, particular attention must be given to ensure that the equal pay provisions of Convention No. 100 are applied, including equal pay for work of equal value.

The ILO should play a much more active role in ensuring that temporary employment agencies respect basic labour standards, as well as in collecting data on abuses and best practices, while at the same time monitoring and analysing trends in employment in both the private and public employment agency sector. This research should focus on issues relating to the economic crisis and the Global Jobs Pact. The Global Unions should participate in this work.

Workers supplied by temporary work agencies must never be used to replace striking workers or undermine industrial action.

Temporary work agencies must not charge any fees to workers for dispatching them.

The user-enterprise must be held liable for all financial and other obligations with respect to temporary agency workers should the agency fail to honour its responsibilities.

Principles of public policy with respect to temporary agency work

Governments have the responsibility to protect the interests of society in stable employment relationships and to ensure the applicability of labour law, the branch of law developed to protect workers in both public and private sectors, in their unequal relationship with employers.

Governments can limit or ban the use of temporary work agencies in order to protect these broader societal interests.

Government must set strict regulations and licensing conditions if agencies are permitted to operate.

Governments should consult trade unions on issues related to working and employment conditions of the agency workers, as well as on conditions of use of temporary agency work prior to making changes in the regulatory framework.

The respective roles, obligations and rights of the workers, the temporary work agency and the enterprise using the worker must be clarified when there is an employment relationship between a temporary work agency and a worker.

Governments must take genuine and concrete measures such as changes in legislation to ensure that workers dispatched by temporary work agencies are able to effectively exercise their right to join or form trade unions. This includes the right to join a union with a collective bargaining relationship with the user enterprise and be part of a bargaining unit comprising direct employees of the user enterprise and be covered by all collective bargaining agreements applying to the user-enterprise.

Governments should strengthen labour inspection, including through providing adequate resources, in order to effectively apply labour law and regulations to employment via temporary work agencies.

Governments should provide effective mechanisms to protect all workers from health and safety hazards and ensure health & safety conditions of temporary agency workers are the same as of permanent ones. Governments should introduce sanctions for user-enterprises, public and private, not complying with health & safety requirements.

Migrant workers dispatched through temporary agencies face specific problems. Migrant workers should receive details of their living and working conditions in a language they understand before leaving their country of origin.

Governments must take active measures to prevent human trafficking and the exploitation of migrant workers by labour intermediaries, both public and private, including temporary work agencies.

Governments should ensure that immigration legislation governing migrant workers recruited through agencies does not conflict with labour laws by imposing restrictions on migrant workers' rights to join trade unions or bargain collectively.

Workers should not be required to pay deposits, visa, transportation and hiring fees. In the case of agencies dispatching workers to other countries, the agencies should be required to repatriate workers in the event that their employment ends or the user company disappears.

Workers must not be required to surrender their passports or other travel or identity documents.

Temporary migrant workers should have full rights to legal redress in the country where they work.

APPENDIX 2

Non-standard work – the end game